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No.

IN THE

Supreme Court of the United States

RUBEN CARNERO, PETITIONER

v.

BOSTON SCIENTIFIC CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the judicially created presumption against extraterritorial application of domestically oriented legislation recognized in cases such as *Foley v. Filardo*, 336 U.S. 281 (1949) applies to the "whistleblower" section of the Sarbanes-Oxley Act?

The Opinion of the United States Court of Appeals for the First Circuit for which review is sought, *Carnero v. Boston Scientific Corporation*, 433 F.3 1 (2006), answered this question in the affirmative, holding that the whistleblower section of the Sarbanes-Oxley Act applies only to domestic employees of companies subject to the Act. The SEC has determined that other sections of the Sarbanes-Oxley Act, which use essentially identical language to define their scope, apply extraterritorially. *See, e.g.*, SEC Release Nos. 33-8177; 34-47235 (at § II.C), 68 F.R. 5110, 5120 (January 31, 2003) (interpreting sections 406 and 407 of the Act); SEC Exchange Act Release Nos. 34-47225, IC-25909, 2003 SEC LEXIS 184 (January 22, 2003) at § 11.B (interpreting section 306 of the Act).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 5

CONCLUSION 12

APPENDIX

Opinion of the United States Court of Appeals for the First Circuit 1a

Memorandum of Decision of the United States District Court for the District of Massachusetts 40a

February 2, 2006 Order of the First Circuit denying petition for panel and en banc rehearing 45a

Section 806 of the Sarbanes-Oxley Act the "whistleblower section"), 18 U.S.C. § 1514A(a) 46a

TABLE OF AUTHORITIES

Page

CASES

Clark v. Martinez, 543 U.S. 371, 125 S.Ct. 716 (2005) 7, 8

EEOC v. Arabian American Oil, 499 U.S. 244 (1991) 11

Exide Technologies/ CEAC, CNIL Delib. No. 2005-111 (May 26, 2005) (French) 10

Foley v. Filardo, 336 U.S. 281 (1949) 2

McDonald's, CNIL Deliberation no. 2005-110 (May 26, 2005) (French) 10

Pasquantino v. United States, 125 S. Ct. 1766 (2005) 10

Spector v. Norwegian Cruise Line, 125 S. Ct. 2169 (2005) 8

Small v. United States, 125 S.Ct. 1752 (2005) 10, 11

STATUTES

Sarbanes-Oxley Act, Pub. L. No. 107-204 ..... *passim*

Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A(a) 1

Securities Act of 1933 ..... 5, 6

Securities Exchange Act of 1934 5

OTHER AUTHORITIES

DOL Release Regarding Regulations for Section 806 of the Sarbanes-Oxley Act, 69 F.R. 52104, 52105

(August 24, 2004) 7

SEC Release Regarding Regulations for Section 306(a) of the Sarbanes-Oxley Act, Exchange Act Release Nos. 34-47225, IC-25909, 2003 SEC LEXIS 184 (January 22, 2003) 6

SEC Release Regarding Regulations for Section 307 of the Sarbanes-Oxley Act, Exchange Act Release Nos. 33-8185, 34-47276, IC-25929, 2003 SEC LEXIS 256 (January 29, 2003) 6

SEC Release Regarding Regulations for Sections 406 and 407of the Sarbanes-Oxley Act, Release Nos. 33-8177; 34-47235, 68 F.R. 5110 (January 31, 2003) 2

SEC Release Regarding Regulations for Section 802 of the Sarbanes-Oxley Act, Release Nos. 33-8180, 34-47241, IC-25911, FR-66, 2003 SEC LEXIS 196 (January 24, 2003) 6

Petitioner Ruben Carnero petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The First Circuit's Opinion is reported at 433 F.3d 1 and reproduced in the Appendix at 1(a). The Opinion affirms a Memorandum of Decision issued by the United States District Court for the District of Massachusetts dismissing Mr. Carnero's complaint. That Memorandum of Decision, which is unpublished, is reproduced at Appendix 40(a). On February 2, 2006, the First Circuit issued an Order denying Mr. Carnero's petition for panel and en banc rehearing. A copy of that Order is reproduced at Appendix 45a.

JURISDICTION

The First Circuit issued its Opinion on January 5, 2006. A timely petition for panel and en banc rehearing was denied on February 2, 2006, resulting in a deadline of May 3, 2006 for the filing of this Petition for a Writ of Certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Section 806 of the Sarbanes-Oxley Act (the "Whistleblower section"), codified at 18 U.S.C. § 1514A(a) and reproduced at Appendix 46(a).

STATEMENT

This petition seeks review of an opinion of the First Circuit holding that the "whistleblower" section of the Sarbanes-Oxley Act does not apply to overseas employees of companies otherwise covered by the Act. Even though the statutory language applies to any employee of covered companies, the First Circuit restricted the statute to domestic employees by applying the judicially created presumption against extraterritorial enforcement of domestically-oriented statutes recognized in cases such as *Foley v. Filardo*, 336 U.S. 281 (1949).

The First Circuit's opinion conflicts with the SEC's determination that other sections of the Sarbanes-Oxley Act, which use essentially identical language to define their scope, apply extraterritorially. The SEC has ruled that its interpretation of the statutory language:

> comports both with the plain language of the above statutory sections . . . as well as with the overarching purpose of the Sarbanes-Oxley Act, which is to restore investor confidence in US financial markets, regardless of the origin of the market participants.

SEC Release Nos. 33-8177; 34-47235 (at § II.C), 68 F.R. 5110, 5120 (January 31, 2003) (interpreting sections 406 and 407 of the Act).

The First Circuit recognized that its decision is at odds with the Act's overarching purpose of protecting the integrity of US securities markets, conceding that

> [f]rauds against foreign subsidiaries uncovered by foreign whistleblowers may, undoubtedly, threaten US investors in the parent just as do domestic frauds.

App. 12a-13a; 433 F.3d at 8. Indeed, by excluding overseas employees from the statute's scope, the First Circuit's opinion may insulate foreign operations of covered companies from an important enforcement mechanism of the Act.

The First Circuit nevertheless felt compelled by the *Foley* presumption to reject the plain meaning of the statutory language because the Court could not discern an express statement in the Act's legislative history that Congress intended the whistleblower section to apply extraterritorially. App. 17a-25a; 433 F.3d at 11-14.

The issue arose in this case when petitioner Ruben Carnero filed a complaint under the Sarbanes-Oxley whistleblower section with the United States Department of Labor in July 2003. Between 1997 and 2002, Mr. Carnero held a variety of senior management positions for Boston Scientific Corporation, including Latin American Business Development Director, Country Manager for Argentina and Country Manager for Brazil. Although he was hired by managers in the company's Massachusetts headquarters and he traveled to Massachusetts frequently during his employment, Mr. Carnero was always stationed in Latin America. He consistently received excellent performance evaluations from headquarters staff and regularly received stock option awards, which are reserved for senior management employees "who demonstrate the

greatest potential for long term effect upon the value and success of the business."

After Mr. Carnero discovered that false invoices and inflated sales reports were being generated in the company's Argentine and Brazilian subsidiaries, he met with headquarters staff in May 2002 to insist that they investigate the problem. He was told that an in-house lawyer would lead the investigation and report the results to senior management as well as to Mr. Carnero. In August 2002, however, four headquarters executives, including the lawyer assigned to investigate the false sales problem, traveled to Brazil, where Mr. Carnero was then stationed. Mr. Carnero was asked to meet with them in one of their hotel rooms, where he expected to be told the results of the lawyer's investigation. Instead, Mr. Carnero was summarily terminated, prohibited from returning to his office and told only that he was being fired for "differences in management style."

The Department of Labor issued a preliminary decision dismissing Mr. Carnero's whistleblower claim pursuant to the *Foley* presumption. *See Carnero v. Boston Scientific Corporation*, 2004-SOX-22 (OSHA Reg'l Adm'r) (Dec. 19, 2003). Mr. Carnero then sought *de novo* review from the district court pursuant to the provision of the whistleblower section providing that a claimant may bring a federal court action if the Secretary of Labor has not issued a final decision within 180 days. *See* 18 U.S.C. § 1514A(b)(1)(B). Both the district court and the First Circuit issued opinions dismissing Mr. Carnero's whistleblower complaint based on the *Foley* presumption. The First Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 because the

district court's dismissal of Mr. Carnero's complaint is a final order or judgment that disposed of all of the parties' claims.

REASONS FOR GRANTING THE PETITION

I. THE TERRITORIAL SCOPE OF THE SARBANES-OXLEY ACT IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

A. A Conflict Exists Between the First Circuit's Opinion and the SEC's Determinations Regarding the Act's Territorial Scope.

The First Circuit recognized that Congress used essentially the same language to define the scope of the whistleblower section of the Sarbanes-Oxley Act as it did to define the scope of most of the other sections of the Act. App. 34(a) n. 6; 433 F.3d at 10 n. 6. In particular, both the whistleblower section and most of the Act's other sections define their scope by referring to the registration and reporting requirements that apply to companies listed on US securities exchanges.[1]

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[1]In particular, most of the Act's sections apply to "Issuers," which is defined in Section 2(a)(7) of the Act as "an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) (15 U.S.C. 78o(d), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn." The whistleblower uses the text of the definition of Issuer to define its scope with the exception that the last phrase of the definition, "or that files or has filed a registration statement that

Those registration and reporting requirements apply to both domestic and foreign companies listed on US securities exchanges. App. 8(a), 433 F.3d at 5-6 (citing *Pinker v. Roche Holdings*, 292 F.3d 367 (3d Cir. 2002)). More than one thousand foreign companies were listed on such exchanges as of December 31, 2003. *Id.* (citing SEC's website).

The First Circuit and the SEC, however, have interpreted the statutory language defining its scope to have vastly different geographic scope. Relying on the plain meaning of the statutory language and the statute's purpose of protecting investors in companies listed on US securities exchanges, the SEC has held that the language has extraterritorial scope. *See, e.g.*, SEC Release Nos. 33-8177; 34-47235 (at § II.C), 68 F.R. 5110, 5120 (January 31, 2003) (interpreting sections 406 and 407 of the Act); SEC Exchange Act Release Nos. 34-47225, IC-25909, 2003 SEC LEXIS 184 (January 22, 2003) at § 11.B (interpreting section 306 of the Act).[2] In contrast, the First Circuit relied on the *Foley*

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has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn" is not included. The scope of the whistleblower section is therefore slightly narrower than the scope of most of the other sections of the Act because it does not apply to companies that have filed a registration statement to become listed on a US securities exchange that has not yet become effective.

[2] *See also, e.g.*, SEC Release Regarding Regulations for Section 307 of the Sarbanes-Oxley Act, Exchange Act Release Nos. 33-8185, 34-47276, IC-25929, 2003 SEC LEXIS 256 (January 29, 2003); SEC Release Regarding Regulations for Section 802 of the Sarbanes-Oxley Act, Release Nos. 33-8180, 34-47241, IC-25911, FR-66, 2003 SEC LEXIS 196 (January 24, 2003).

presumption to restrict the statutory language to domestic conduct. *See, e.g.*, App. 10a, 433 F.3d at 6 ("if Carnero's whistleblowing had occurred in this country relative to similar alleged domestic misconduct by domestic subsidiaries, he might well have a potential claim").[3]

This Court recently reaffirmed the principle that identical statutory language used in different sections of the same statute must be given the same meaning. *Clark v. Martinez*, 543 U.S. 371, 125 S.Ct. 716, 722-23 (2005). In *Small*, which involved identical language used in three separate sections of an immigration statute, this Court explained:

> The operative language [used in the immigration statute] applies without differentiation to all three categories of aliens that are its subject. *To give these same words a different meaning for each category would be to invent a statute rather*

[3]Ordinarily, the SEC's interpretation would be given controlling weight since federal courts must defer to administrative interpretations that are not "arbitrary, capricious or manifestly contrary to the statute" where, as here, Congress explicitly delegated such rule-making authority to the agency. *Chevron v. NRDC*, 467 U.S. 837, 844 (1984); *United States v. Mead Corporation*, 533 U.S. 218, 226-27 (2001). *See also, e.g.*, Section 307 of the Sarbanes-Oxley Act (delegating such rule-making authority to the SEC); App. 34(a)-35(a) n. 8, 433 F.3d at10 n.8. In contrast, even though the Congress directed the DOL to administer whistleblower complaints, Congress did not delegate rule-making authority to the DOL, which has expressly refrained from promulgating a policy regarding the territorial scope of the whistleblower section. App. 29(a), 433 F.3d at 17 (quoting DOL Sarbanes-Oxley *Regulations*, 69 Fed. Reg. 52104-01, 52105, 2004 WL 1876043 (Aug. 24, 2004)).

than interpret one.

Id. (emphasis added); *see also Spector v. Norwegian Cruise Line*, 125 S. Ct. 2169, 2183 (2005) (reaffirming *Clark's* holding that identical statutory language in different sections of the same statute must be given the same meaning).

Congress used precise, technical language to define the territorial scope of the Sarbanes-Oxley Act. The same language defining the scope of the whistleblower section was also used to define the scope of other sections of the Act. Unless that language is given consistent interpretation, the purpose of the Act and Congress' intentions will be frustrated. Accordingly, this Court should resolve the conflict between the First Circuit's and the SEC's interpretation of the statutory language defining the territorial scope of the Sarbanes-Oxley Act.

B. The Territorial Scope of the Sarbanes-Oxley Act is an Important Question of Federal Law.

The Sarbanes-Oxley Act is a major piece of legislation bundling together a large number of diverse and independent statutes, all designed to improve the quality and transparency of financial reporting and auditing of public companies listed on US securities exchanges. App. 15(a), 433 F.3d at 9. In considering the legislation, Congress explicitly considered whether its territorial scope should extend to foreign companies listed on US securities exchanges. App. 24(a)-25(a), 433 F.3d at 14 (quoting Senator Enzi's comment regarding the "need to be clear with respect to the area of foreign

issuers and their coverage under the bill's broad definitions"). Congress settled on language whose plain meaning clearly subjects those companies to most of the Act's sections, including the Act's whistleblower section. With respect to the whistleblower statute, one of the sections co-drafters, Senator Leahy, stated:

> The law was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market.

App. 21(a), 433 F.3d at 13 (quoting from 149 Cong. Rec. S1725-01, S1725, 2003 WL 193278 (Jan. 29, 2003).

Whether Congress' language should be given its plain meaning, and hence extraterritorial application, or whether it should be restricted to domestic conduct pursuant to the *Foley* presumption is an important question of federal law. Limiting the Act to domestic conduct would substantially weaken its protection of investors in US securities markets, especially in light of the extent of global operations of many public companies today. Conversely, the SEC's extraterritorial interpretation of most of the Act's provisions have already raised significant issues regarding potential conflicts with foreign law. For example, section 301 of the Act requires covered companies to protect the anonymity of employees reporting accounting fraud or other securities law violations. App. 16(a), 433 F.3d at 9-10. European tribunals have held that the SEC's extraterritorial interpretation of section 301 conflicts with European law protecting due process rights of the individuals who may be the subject of anonymous whistleblower's

allegations. *See McDonald's*, CNIL Deliberation no. 2005-110 (May 26, 2005); *Exide Technologies/ CEAC*, CNIL Delib. No. 2005-111 (May 26, 2005) (anonymous whistleblower "hotlines" violate French law).

Regardless of how the Act's territorial scope is interpreted, that scope is an important question of federal law that this Court should resolve.

II. APPLICATION OF THE FOLEY PRESUMPTION SHOULD BE CLARIFIED IN LIGHT OF TODAY'S GLOBAL ECONOMY.

This Court has recently clarified that the *Foley* presumption does not create a "clear statement" rule that would "impose upon Congress a special burden of specificity" and that the presumption is restricted to "domestically oriented statutes." *Small v. United States*, 125 S.Ct. 1752, 1756 (2005). In *Small*, this Court explained that the *Folely* presumption is simply

> an ordinary assumption about the reach of *domestically oriented statutes* here – an assumption that helps us determine Congress' intent where Congress likely did not consider the matter and where other indicia of intent are in approximate balance. We consequently assume a Congressional intent . . . domestically, not extraterritorially. But, at the same time, *we stand ready to revise this assumption should statutory language, context, history or purpose show the contrary.*

Id. (emphasis added). *See also Pasquantino v. United States*, 125 S. Ct. 1766, 1780 (2005) (presumption against

extraterritoriality is limited to statutes "in which Congress had only 'domestic concerns in mind.'") (quoting *Small, supra*).

Indeed, before the First Circuit's Opinion, the presumption has never been applied to securities statutes, anti-trust laws or other laws that necessarily include some international conduct within their scope in order to protect US interests. The First Circuit's Opinion is also the first application of the presumption to circumstances where the statute's extraterritorial plain meaning is consistent with, and would advance, the statute's underlying purpose.

This Court should therefore allow the Writ of Certiorari in order to consider whether the First Circuit's expansion of the scope of the *Foley* presumption is justified. In addition, allowance of the writ will also provide this Court with an opportunity to review the *Foley* presumption in the context of today's global economy and the technological advances that now make global travel and communication common place. The last decision of this Court that considered the *Foley* presumption in depth was this Court's 1991 decision in *EEOC v. Arabian American Oil*, 499 U.S. 244 (1991). In the intervening 15 years, advances in technology, the spread of global commercial operations and the increased frequency with which Congress and this Court must deal with international legal issues make re-examination of the *Foley* presumption appropriate.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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(any footnotes trail end of each document)
Nos. 04-1801, 04-2291
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RUBEN CARNERO,
Plaintiff, Appellant,

v.

BOSTON SCIENTIFIC CORPORATION,
Defendant, Appellee.

January 5, 2006, Decided

COUNSEL: Edward Griffith, with whom Silvia Bolatti and Bolatti & Griffith were on brief for appellant.

James W. Nagle, with whom Leslie S. Blickenstaff and Goodwin Procter LLP were on brief for appellee.

JUDGES: Before Boudin, Chief Judge, Campbell and Cyr, Senior Circuit Judges.

OPINIONBY: CAMPBELL

OPINION: CAMPBELL, Senior Circuit Judge. Plaintiff-appellant Ruben Carnero ("Carnero") appeals from judgments of the United States District Court for the District of Massachusetts dismissing his federal and state law complaints against Boston Scientific Corporation ("BSC"). Both complaints alleged that BSC had terminated him in retaliation for "whistleblowing" -- for telling BSC that Latin American subsidiaries had created false invoices and had inflated sales figures. The district court determined that Carnero, an Argentinian

citizen resident in Brazil who worked for the two BSC subsidiaries and whose whistleblowing pertained to their alleged improprieties in Latin America, could not sue BSC under the whistleblower protection provision contained in Title VIII, Section 806, of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (2005). In the district court's view, that provision is without extraterritorial effect. The court also held that Carnero could not pursue state law claims against BSC as he "had no contact with the defendant in Massachusetts" and as defendant did not "in any way direct or control" his employment. For the reasons discussed below, we affirm.

I. Background

As said, Carnero is a citizen of Argentina and currently resides in Brazil. The defendant, BSC, is a Delaware corporation with headquarters in Natick, Massachusetts. BSC manufactures medical equipment and has operations in many countries throughout the world.

In 1997, Carnero, while residing in Argentina, accepted employment with a BSC subsidiary in Argentina, Boston Scientific Argentina S.A. ("BSA"), an Argentinian company. His employment agreement, entered into in Argentina although negotiated in various countries including the United States, provided that his place of work was BSA's headquarters (which is in Buenos Aires), that he would be paid in pesos, and that the employment agreement was governed by the laws of Argentina. Carnero initially worked for BSA as Country Manager for Argentina and then served as the Latin America Business Development Director. In 2001, he took an assignment as Country Manager for a Brazilian subsidiary of BSC, Boston Scientific Do Brasil Ltda.

("BSB"), while still employed by BSA. Carnero asserts that he was terminated from BSB in August 2002, and from BSA in April 2003, in retaliation for reporting to supervisors at BSC that BSC's Argentinian and Brazilian companies, as well as other foreign companies, were engaged in accounting misconduct by, inter alia, improperly inflating sales figures.

It is undisputed that Carnero was directly employed and paid by BSC's Argentinian and Brazilian subsidiaries rather than by BSC itself. It is also undisputed that the alleged fraudulent conduct reported by Carnero was instituted in Latin America. But Carnero also asserts he had an overarching employment relationship with the United States parent, BSC, resulting from the extensive and continuous control BSC's own Massachusetts employees allegedly exercised over his work and duties in Latin America. He says that he maintained contact with BSC, traveling frequently to Massachusetts to meet with supervisors there. Carnero does not dispute, however, that his employment duties were mainly performed outside of the United States, nor that his immediate employers were the two foreign subsidiaries.

In April 2003, Carnero pursued a "conciliation proceeding" in Argentina, a prerequisite to filing suit in an Argentinian court for statutory termination benefits from BSC and BSA. Argentinian employees terminated without cause are entitled to such benefits. An Argentinian mediator held a hearing with BSC, BSA and Carnero, but a settlement could not be reached. On June 20, 2003, BSC and BSA brought their own claims in the Argentinian court, alleging, inter alia, defamation based on Carnero's claims of billing irregularities. On

June 23, 2003, the Argentinian court denied a preliminary injunction, finding that Carnero's claims of "operating irregularities" had not been shown to be false or publicized to third parties. The Argentinian action appears to be ongoing.

On July 2, 2003, Carnero filed a complaint against BSC with the United States Department of Labor ("DOL") pursuant to the whistleblower protection provision contained in Title VIII, Section 806, of the Sarbanes-Oxley Act of 2002. 18 U.S.C. § 1514A(b)(1)(A) (providing for filing of complaint with the United States Secretary of Labor).[1] On August 8, 2003, Carnero filed a complaint against BSC in the United States District Court for the District of Massachusetts based on diversity of citizenship under 28 U.S.C. § 1332(a)(2) (1993 & Supp. 2005), asserting state law claims, including breach of contract and retaliatory termination.

On December 19, 2003, the DOL issued a preliminary decision dismissing Carnero's Sarbanes-Oxley whistleblower claim. The DOL found that BSC was covered by the Sarbanes-Oxley whistleblower provision because it is a publicly traded company on the New York Stock Exchange. The DOL ruled, however, that the whistleblower protection provision of the Act did not apply to employees of covered companies working outside of the United States. Carnero v. Boston Scientific Corp., 2004-SOX-22 (OSHA Reg'l Adm'r) (Dec. 19, 2003) (citing *Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285, 69 S. Ct. 575, 93 L. Ed. 680 (1949)* (noting that it is well settled that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States")). Carnero then filed a complaint in the United States District Court for the

District of Massachusetts on January 7, 2004, seeking de novo judicial review of his Sarbanes-Oxley whistleblower claim. See 18 U.S.C. § 1514A(b)(1)(B) (providing that claimant may bring federal court action if Secretary of Labor has not issued final decision within 180 days of filing of complaint and there is no showing that delay is due to claimant's bad faith).[2] Both of Carnero's district court complaints sought his reinstatement, among other relief.

BSC moved to dismiss both complaints. On March 25, 2004, the district court dismissed Carnero's state law claims, finding that Carnero "had no contact with the defendant in Massachusetts" and that defendant did not "in any way direct or control" his employment. Carnero v. Boston Scientific Corp., No. 03-11479-RWZ (D. Mass.) (Mar. 25, 2004 endorsed order). The court subsequently denied both Carnero's motion for reconsideration pursuant to Fed. R. Civ. P. 59(e) and his motion to consolidate the state law action with the federal law action pursuant to Fed. R. Civ. P. 42(a). Id. (May 13, 2004 endorsed order). On August 27, 2004, the court dismissed Carnero's claim brought under the whistleblower protection provision of the Sarbanes-Oxley Act, after examining the language and legislative history of the law. Carnero v. Boston Scientific Corp., 2004 U.S. Dist. LEXIS 17205, No. 04-10031-RWZ, 2004 WL 1922132 (D. Mass. Aug. 27, 2004) (citing *Foley Bros., 336 U.S. at 285-86*). The court agreed with the DOL's preliminary determination that "nothing in Section 1514A(a) remotely suggests that Congress intended it to apply outside of the United States." Id. 2004 WL 1922132 at *2. Carnero appeals from these rulings.

II. The Federal Claim

We turn first to the dismissal of Carnero's complaint brought under the whistleblower protection statute, 18 U.S.C. § 1514A, of the Sarbanes-Oxley Act. Insofar as we know, no court has yet determined if this provision protects foreign citizens working outside of the United States for foreign subsidiaries of covered companies. The interpretation of a statute engenders our de novo review. *Bonano v. E. Caribbean Airline Corp., 365 F.3d 81, 83 (1st Cir. 2004).*

As noted, Carnero initially filed a complaint against BSC (the parent U.S. company) with the United States Department of Labor pursuant to 18 U.S.C. § 1514A(b)(1)(A). The DOL, acting through its agency, OSHA, rejected this in a preliminary report, on the ground that the whistleblower protection statute did not protect employees of covered companies working outside of the United States. Carnero v. Boston Scientific Corp., 2004-SOX-22 (OSHA Reg' Adm'r) (Dec. 19, 2003), supra. No final agency report having issued within 180 days, Carnero brought a similar complaint against BSC in the United States District Court for the District of Massachusetts, seeking, under the provisions of the statute, de novo judicial review of his whistleblower claim. See 18 U.S.C. § 1514A(b)(1)(B). In its dismissal of that action, the district court echoed OSHA's prior view that the whistleblower protection provision of the Sarbanes-Oxley Act does not apply outside of the United States. See supra.

A. Whether Carnero's Claim -- Apart from the Question of Extraterritoriality -- Fits otherwise within the Terms of the Whistleblower Protection Provision

Before proceeding to ask whether the instant whistleblower protection provision of the Sarbanes-Oxley Act

was meant by Congress to provide extraterritorial relief, it is sensible to ask whether Carnero's claim is of the kind that would, if arising domestically, fit within that provision's language. If not, little need would exist to explore the extraterritorial issue. We conclude as an initial matter, without deciding finally, that Carnero's claim would -- putting aside the issue of extraterritoriality -- fit generally within the whistleblower protection provision of 18 U.S.C. § 1514A.

The whistleblower protection provision codified in 18 U.S.C. § 1514A is a relatively small part of the Sarbanes-Oxley Act which is composed of many separate statutes and statutory schemes aimed at achieving the Act's investor-protection goals. The instant whistleblower protection statute creates an administrative complaint procedure and, ultimately a federal civil cause of action, designed to protect the "employees of publicly traded companies" who lawfully "provide information . . . or otherwise assist in an investigation regarding any conduct which the employee believes constitutes a violation" of the federal mail, wire, bank, or securities fraud statutes, any rule or regulation of the Securities and Exchange Commission ("SEC"), or other provision of the Federal law relating to fraud against the shareholders. 18 U.S.C. § 1514A(a).[3]

An individual complaining under this section of the Act must, therefore, ordinarily be -- as Carnero alleges he is -- an "employee" of a publicly traded company subject to the Act. Id.[4] BSC is a publicly traded company listed on the New York Stock Exchange although its two foreign subsidiaries, BSA and BSB, for which Carnero directly worked, are not. Companies subject to the Act are those "with a class of securities registered under section

12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l)" or "required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d))." Id. These registration and reporting provisions apply to U.S. and foreign companies listed on U.S. securities exchanges. See, e.g., *Pinker v. Roche Holdings Ltd., 292 F.3d 361, 367 (3d Cir. 2002)* (noting that foreign securities listed on U.S. securities exchanges must abide by the Exchange Act's registration and reporting requirements);[5] see also http://www.sec.gov/divisions/corpfin/internatl/geographic.htm (listing more than one thousand foreign companies registered and reporting with the SEC as of Dec. 31, 2003).

As noted, Carnero was directly in the employ of BSC's foreign subsidiaries, BSA and BSB, not themselves listed foreign companies. He claims, however, that supervision by U.S. headquarters personnel of the parent made him an employee of BSC also. Moreover, apart from that, the fact that he was employed by BSC's subsidiaries may be enough to make him a BSC "employee" for purposes of seeking relief under the whistleblower statute. The DOL regulations pertaining to the whistleblower provision of the Sarbanes-Oxley Act define "employee" as someone "presently or formerly working for a [publicly-traded] company or company representative" (emphasis supplied). The latter term is defined as including a "contractor . . . or agent of a company." See 29 C.F.R. § 1980.101 (2005). If BSA and BSB were agents of BSC, as seems quite possible, their own employee would fit this definition of the parent's "employee." Hence Carnero, by virtue either of his own asserted contacts with BSC or his direct employment by its subsidiaries, or both, may well be an "employee" of

BSC for purposes of 18 U.S.C. § 1514A. Neither party, indeed, contests that Carnero was a covered employee of BSC for purposes of seeking whistleblower relief under Sarbanes-Oxley. See *Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1373 n.7 (N.D. Ga. 2004)* (holding that employee of subsidiary is covered "employee" within meaning of 18 U.S.C. § 1514A where officers of publicly traded parent company have authority to affect employment of subsidiary's employees); Morefield v. Exelon Servs., Inc., 2002-SOX-2 (ALJ) (Jan. 28, 2004) (holding that "subsidiaries, for Sarbanes-Oxley purposes, are more than mere agents like an outside auditor or consultant . . . [they] are an integral part of the publicly traded company"). We shall, therefore, assume for present purposes, but without deciding, that Carnero was a covered employee of BSC. We shall also assume, for purposes of this appeal, again without deciding, that there is evidence that Carnero's employment was terminated in retaliation for conduct protected against by 18 U.S.C. § 1514A.

The whistleblower statute also makes clear that the misconduct it protects against is not only that of the publicly traded company itself, but also that of "any officer, employee, contractor, subcontractor, or agent of such company," who retaliates or otherwise discriminates against the whistleblowing employee. See 18 U.S.C. § 1514A(a). Thus, the statute can be read to embrace an agent-subsidiary's retaliation against a protected employee. As Carnero may be an "employee" of BSC, supra, his alleged retaliatory discharge by its subsidiaries for reasons forbidden in the Act could (putting aside any question of extraterritorial application) violate the terms of the whistleblower protection provision of the Sarbanes-Oxley Act.

We conclude, therefore, that if Carnero's whistleblowing had occurred in this country relative to similar alleged domestic misconduct by domestic subsidiaries, he might well have a potential claim under the whistleblower protection provision of the Sarbanes-Oxley Act. This being so, we proceed to the next question, whether the whistleblower provision of the Act has extraterritorial effect, so that a foreign employee such as Carnero who complains of misconduct abroad by overseas subsidiaries, may bring suit under the whistleblower provision of Sarbanes-Oxley against the listed United States parent company. We think not.

B. The Presumption Against Extraterritorial Application

Carnero argues that the whistleblower protection statute, 18 U.S.C. § 1514A, should be given extraterritorial effect, so as to allow him to pursue in federal court his whistleblower claim brought under its provisions. He says his claim not only fits within the literal language of the statute, supra, but that to limit the operation of the statute to purely domestic conduct in the United States would improperly insulate the foreign operations of covered companies. This, he says, would frustrate the basic purpose of the Sarbanes-Oxley Act of which the whistleblower protection statute at issue is a part, to protect both the investors in U.S. securities markets and the integrity of those markets.

While Carnero's argument has some force, it faces a high and we think insurmountable hurdle in the well-established presumption against the extraterritorial application of Congressional statutes. Where, as here, a statute is silent as to its territorial reach, and no con-

trary congressional intent clearly appears, there is generally a presumption against its extraterritorial application. *E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991)* ("Aramco") ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'") (quoting *Foley Bros., 336 U.S. at 285); see also Small v. United States, 161 L. Ed. 2d 651, 125 S. Ct. 1752, 1755 (2005)* (recognizing that presumption is alive and well). In the present case, whatever help to investors its overseas application might in theory provide is offset not only by the absence of any indication that Congress contemplated extraterritoriality but by a variety of indications that Congress thought the statute was limited to the territorial jurisdiction of the United States.

The Supreme Court stated in Aramco that a court is to assume that Congress legislates with an awareness of the presumption against extraterritorial application. 499 U.S. at 248. Thus, the presumption can be overcome only if there is an "'affirmative intention of the Congress clearly expressed.'" Id., (quoting *Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147, 77 S. Ct. 699, 1 L. Ed. 2d 709 (1957)); see Smith v. United States, 507 U.S. 197, 204, 113 S. Ct. 1178, 122 L. Ed. 2d 548 (1993)* (requiring "clear evidence of congressional intent" to apply statute extraterritorially). In searching for clear evidence of Congress's intent, courts consider "all available evidence" about the meaning of the statute, including its text, context, structure, and legislative history. Cf. *Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 177, 113 S. Ct. 2549, 125 L. Ed. 2d 128 (1993).*

The presumption serves at least two purposes. It protects against "unintended clashes between our laws and those of other nations which could result in international discord," and it reflects the notion that when Congress legislates, it "'is primarily concerned with domestic conditions.'" *Aramco, 499 U.S. at 248, (quoting Foley Bros., 336 U.S. at 285).* The Supreme Court has invoked the presumption in several cases involving the scope of broad regulatory statutes. *See, e.g., Sale, 509 U.S. at 173* (holding that section 243(h) of Immigration and Nationality Act of 1952 did not protect aliens seized by authorities on high seas, despite broad language in statute referring to "any alien"); *Aramco, 499 U.S. at 249* (holding that the version of Title VII of Civil Rights Act of 1964 then in force did not regulate employment practices of U.S. firms employing U.S. citizens abroad, even though the statute contained broad provisions extending its prohibitions to, for example, "any activity, business, or industry in commerce"); *Foley Bros., 336 U.S. at 285* (holding that federal labor statute requiring an eight-hour day provision in "every contract made to which the United States . . . is a party" did not apply to contracts for work performed in foreign countries).

To be sure, in appropriate circumstances Congress's extraterritorial intent has on occasion been implied without explicit statement in the text or even history. Courts, as noted, will examine a statute's context and structure as well as its purpose and "all available evidence" in order to determine Congress's actual intent. Cf. *Sale, 509 U.S. at 177.* Carnero would, as noted, have us find implicit evidence of Congress's intent to apply the Act extraterritorially in the Act's purpose to protect U.S. investors and markets against frauds. Frauds against foreign subsidiaries uncovered by foreign whis-

tleblowers may, undoubtedly, threaten U.S. investors in the parent just as do domestic frauds.

Carnero refers us to cases such as *United States v. Bowman, 260 U.S. 94, 98, 43 S. Ct. 39, 67 L. Ed. 149 (1922)* (presumption against extraterritoriality held not to limit a federal criminal statute, the terms of which were violated by U.S. citizens when they conspired abroad to defraud a domestic company partly owned by the United States government). Similarly, Carnero notes that the Supreme Court has held the Sherman Act to apply to anti-competitive conduct abroad "that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993). See also, e.g., Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968)* (civil anti-fraud provisions of the Exchange Act given extraterritorial application to protect American investors who purchase foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities).

But while the Sarbanes-Oxley purpose to protect investors and build confidence in U.S. securities markets may be a factor supporting extraterritorial application of the instant whistleblower protection provision, the other pertinent factors run strongly counter to finding an extraterritorial legislative intent. These contrary indicia prevent our determining that Congress has evidenced its "clear intent" for extraterritorial application. Not only is the text of 18 U.S.C. § 1514A silent as to any intent to apply it abroad, the statute's legislative history indicates that Congress gave no consideration

to either the possibility or the problems of overseas application. In sharp contrast with this silence, Congress has provided expressly elsewhere in the Sarbanes-Oxley Act for extraterritorial enforcement of a different, criminal, whistleblower statute. By so providing, Congress demonstrated that it was well able to call for extraterritorial application when it so desired. Also in the Act, Congress has provided expressly for the extraterritorial application of certain other unrelated statutes, tailoring these so as to cope with problems of sovereignty and the like -- again demonstrating Congress's ability to provide for foreign application when it wished. Here, however, while placing the whistleblower provision's enforcement in the hands of the DOL, a domestic agency, Congress has made no provision for possible problems arising when that agency seeks to regulate employment relationships in foreign nations, nor has Congress provided the DOL with special powers and resources to conduct investigations abroad. Furthermore, judicial venue provisions written into the whistleblower protection statute were made expressly applicable only to whistleblower violations within the United States and to complainants residing here on the date of violation, with no corresponding basis being provided for venue as to foreign complainants claiming violations in foreign countries.

These factors, and more, not only fail to imply a clear congressional intent for extraterritorial application, but indicate that Congress never expected such application. We discuss them below.

1. Provisions and Structure of the Sarbanes-Oxley Act

The whistleblower protection statute in 18 U.S.C. §

1514A is one part of the Corporate and Criminal Fraud Accountability Act of 2002. It is incorporated as Title VIII, Section 806, within the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (July 30, 2002). The Sarbanes-Oxley Act itself is a major piece of legislation bundling together a large number of diverse and independent statutes, all designed to improve the quality of and transparency in financial reporting and auditing of public companies. The Act increases criminal penalties for securities fraud and other violations and provides for the promulgation of codes of ethics and various other means for holding public companies to higher reporting standards.

A major part of the Act is devoted to creating a new body, the Public Company Accounting Oversight Board, which, serving under the Securities and Exchange Commission, will supervise and regulate the activities of public accounting firms. The latter, in turn, are made responsible for auditing public companies. Unlike the present whistleblower protection provision contained in Section 806, which makes no reference to foreign entities, Section 106 of the Act deals expressly with foreign accounting firms, requiring them to register with the Board if they audit public companies but carving out exceptions tailored to difficulties inherent in U.S. regulation of overseas professionals. See 15 U.S.C. § 7216(c) (2005) (providing that the SEC or the Board may, as it "determines necessary or appropriate in the public interest or for the protection of investors," exempt a foreign public accounting firm from the Act). The accounting provision reflects Congress's recognition that the application of domestic U.S. regulatory statutes to persons abroad presents problems in addi-

tion to those of purely domestic application, and of the need to address those problems specifically.

Besides the whistleblower statute here at issue, found in Section 806 of the Act, two other separate provisions in Sarbanes-Oxley deal with whistleblower protection. Section 301of the Act requires the audit committees of issuers (which include foreign issuers)[6] to implement internal procedures that facilitate and encourage "anonymous" whistleblowing by employees concerning "questionable accounting or auditing matters." See 15 U.S.C. § 78j-1(m)(4) (2005).[7] Section 301 does not, however, purport to confer enforceable rights upon employees, hence does not implicate the foreign sovereignty and other concerns, infra, raised by a provision like Section 806 providing for an adjudicatory process and remedies.[8]

The other whistleblower provision found in the Sarbanes-Oxley Act, Section 1107, is significant here by way of contrast to the instant Section 806. Section 1107 amended 18 U.S.C. § 1513 (2000 & Supp. 2005) by adding subsection (e)[9] providing criminal sanctions for retaliation against anyone giving truthful information to law enforcement officers relating to the commission of any federal offense.[10] There is express provision for extraterritorial jurisdiction of § 1513 including subsection (e). See 18 U.S.C. § 1513(d) ("There is extraterritorial Federal jurisdiction over an offense under this section."). That Congress provided for extraterritorial reach as to Section 1107 but did not do so as to Section 806 (the provision relevant here) conveys the implication that Congress did not mean Section 806 to have extraterritorial effect. *See Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)*

("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (citation omitted); *see also Aramco, 499 U.S. at 258* ("Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute.").

2. Legislative History

The legislative history of the instant Section 806, 18 U.S.C. § 1514A, gives no indication that Congress meant to apply its civil whistleblower protections extraterritorially. The relevant congressional debate focused upon concern over the lack of whistleblower protection for private corporate employees in many states of the union. The original version of the statute was introduced by Senator Leahy and three cosponsors (Senators Daschle, Durbin and Harkin) on March 12, 2002, see 148 Cong. Rec. S1783-01, 2002 WL 384616, and reported by the Committee on the Judiciary on May 6, 2002, see S. Rep. 107-146, 2002 WL 863249. Senator Leahy explained that the purpose of the statute was to provide federal protection to private corporate whistleblowers, as was already done with government employees, in light of the "patchwork and vagaries of current state [whistleblower protection] laws." See S. Rep. 107-146, at 10 (emphasis added). Senator Leahy addressed the need to provide federal protection where state laws failed to protect certain private corporate whistleblowers, like Sherron Watkins, an employee at Enron Cor-

poration in Texas. It is pertinent to quote Senator Leahy's statements at length:

> In a variety of instances when corporate employees at both Enron and [Arthur] Andersen attempted to report or "blow the whistle" on fraud, [] they were discouraged at nearly every turn. For instance, a shocking e-mail from Enron's outside lawyers to an Enron official was uncovered. This e-mail responds to a request for legal advice after a senior Enron employee, Sherron Watkins, tried to report accounting irregularities at the highest levels of the company in late August 2001. The outside lawyer[] counseled Enron, in pertinent part, as follows: You asked that I include in this communication a summary of the possible risks associated with discharging (or constructively discharging) employees who report allegations of improper accounting practices: 1. Texas law does not currently protect corporate whistleblowers. The [Texas] supreme court has twice declined to create a cause of action for whistleblowers who are discharged * * *
>
> . . . .
>
> According to media accounts, this was not an isolated example of whistleblowing associated with the Enron case. . . . . These examples further expose a culture, supported by law, that discourage employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The

> consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.
>
> . . . .
>
> Corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, although most publicly traded companies do business nationwide. Thus, a whistleblowing employee in one state may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions. Unfortunately, as demonstrated in the tobacco industry litigation and the Enron case, efforts to quiet whistleblowers and retaliate against them for being "disloyal" or "litigation risks" transcend state lines. This corporate culture must change, and the law can lead the way. That is why S. 2010 is supported by public interest advocates, such as the National Whistleblower Center, the Government Accountability Project, and Taxpayers Against Fraud, who have called this bill "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets."
>
> . . . .
>
> The bill does not supplant or replace state law, but sets a national floor for employee protections in the context of publicly traded companies.

Id. at 4-5, 10, 20.[11]

Other parts of the legislative history confirm the legislators' focus on problems within the United States. See 148 Cong. Rec. S6436-02, S6437, 2002 WL 1466715 (July

9, 2002) (statement of Sen. Daschle) ("People like Sherron Watkins of Enron will be protected from reprisal for the first time under federal law. This bill is going to help prosecutors gain important insider testimony on fraud and put a permanent dent in the 'corporate code of silence.'"); id. S6439 (statement of Sen. Leahy) (emphasizing that the Enron case "demonstrates the vulnerability of corporate whistleblowers to retaliation under current law" by pointing to outside counsel's memorandum that "Texas law does not currently protect corporate whistleblowers"); 148 Cong. Rec. S6734-02, S6761, 2002 WL 1532280 (July 15, 2002) (statement of Sen. Snowe) ("The Leahy amendment grants important whistleblower protections to company employees-like Enron's Sherron Watkins-who bravely report wrongdoing occurring within their own corporation."); 148 Cong. Rec. S7350-04, S7358, 2002 WL 1724193 (July 25, 2002) (statement of Sen. Leahy) ("We include meaningful protections for corporate whistleblowers, as passed by the Senate. We learned from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court. Enron wanted to silence her as a whistleblower because Texas law would allow them to do it."); 148 Cong. Rec. H5462-02, H5473, 2002 WL 1724141 (July 25, 2002) (statement of Rep. Jackson-Lee) ("S.2673 extends whistleblower protections to corporate employees. . . . Whistleblowers in the private sector, like Sherron Watkins, should be afforded the same protections as government whistleblowers."); 148 Cong. Rec. S7418-01, S7420, 2002 WL 1731002 (July 26, 2002) (statement of Sen. Leahy) (repeating, almost verbatim, his May 2002 statements in relaying the legislative history of Section 806; emphasizing that private corporate

whistleblowers need federal protection because of "the patchwork and vagaries of current state laws").

Carnero argues that the statute was meant to have extraterritorial reach by pointing to a later statement by Senator Leahy that the statute was "intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market." See 149 Cong. Rec. S1725-01, S1725, 2003 WL 193278 (Jan. 29, 2003). Senator Leahy's overall statements that day were directed to the White House's incorrect interpretation that a whistleblower's disclosure to Congress would only be protected if made to a member conducting an investigation. The specific statement cited by Carnero, however, was once again focusing on the need for federal protection where state law failed to protect corporate whistleblowers. Here is the statement in context:

> The law was designed to protect people like Sherron Watkins from Enron . . . from retaliation when they report fraud to Federal investigators, regulators, or to any Member of Congress. The law was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market.
>
> The reason that Senator Grassley and I know so much about the legislative intent behind this provision is that we crafted it together last year in the Judiciary Committee and worked to make it part of the Sarbanes-Oxley Act on the Senate floor. We had both seen enough cases where cor-

> porate employees who possessed the courage to stand up and "do the right thing" found out the hard way that there is a severe penalty for breaking the "corporate code of silence." Indeed, in the Enron case itself we discovered an e-mail from outside counsel that noted that the Texas Supreme Court had twice refused to find a legal protection for corporate whistleblowers and that implicitly gave Enron the go ahead to fire Ms. Watkins for reporting accounting irregularities.

Id. (emphasis added).

The legislative history thus suggests that Congress was concerned about providing whistleblower protections for corporate employees in the various states. Nowhere in the legislative history is there any indication that 18 U.S.C. § 1514A was drafted with the purpose of extending to foreign employees working in nations outside of the United States the right to seek administrative and judicial civil relief under the Act. While the legislative history contains repeated references to the "states," particularly Texas, there are no parallel references to foreign countries.[12] See *Foley Bros., 336 U.S. at 286-87* (holding that federal Eight Hour Law did not apply overseas where legislative history revealed that Congress was primarily concerned with domestic employment conditions).

By contrast, the legislative history of certain other provisions of the Sarbanes-Oxley Act shows that Congress expressly considered the application of those provisions to foreign entities. For instance, Section 106, whose text as already mentioned applies to foreign public accounting firms, also has history revealing Congress's

thoughts in applying that statute abroad. See S. Rep. 107-205, at 11, 2002 WL 1443523 (July 3, 2002). Senator Sarbanes stated:

> Companies that sell shares to U.S. investors, and are subject to the federal securities laws, can be organized and operate in any part of the world. Their financial statements are not necessarily audited by U.S. accounting firms, and the Committee believes that there should be no difference in treatment of a public company's auditors under the bill simply because of a particular auditor's place of operation. Otherwise, a significant loophole in the protection offered U.S. investors would be built into the statutory system.
>
> Thus, accounting firms organized under the laws of countries other than the United States that issue audit reports for public companies subject to the U.S. securities laws are covered by the bill in the same manner as domestic accounting firms, subject to the exemptive authority of both the [Public Company Accounting Oversight] Board and the SEC.

Section 302 of the Act provides that a company's principal executive officers and principal financial officers, or persons performing similar functions, must certify the material completeness and accuracy of SEC filings. See 15 U.S.C. § 7241 (2005). While the statute itself does not indicate whether officers of both U.S. and foreign companies are covered, its legislative history is suggestive on the subject. See 148 Cong. Rec. S6687-01, S6698, 2002 WL 1486863 (July 12, 2002). Senator Graham stated:

> If companies are being publically traded in the United States, regardless of where their headquarters are located, they ought to be required to meet the same level of accountability that we are establishing for everyone else in this legislation.

Other parts of the legislative history reveal Congress's sensitivity to the application of some of the Act's provisions to foreign entities. Some members of Congress, for instance, were reluctant to impose U.S. corporate reforms on countries with adequate or superior corporate governance regimes. See 148 Cong. Rec. S7350-04, S7356, 2002 WL 1724193 (July 25, 2002). Senator Enzi commented:

> I believe we need to be clear with respect to the area of foreign issuers and their coverage under the bill's broad definitions. While foreign issuers can be listed and traded in the U.S. if they agree to conform to GAAP and New York Stock Exchange rules, the SEC historically has permitted the home country of the issuer to implement corporate governance standards. Foreign issuers are not part of the current problems being seen in the U.S. capital markets, and I do not believe it was the intent of the conferees to export U.S. standards disregarding the sovereignty of other countries as well as their regulators. . . . Under the conference report, section 3(a) [which was enacted] gives the SEC wide authority to enact implementing regulations that are "necessary or appropriate in the public interest." I believe it is the intent of the conferees to permit the Commission wide latitude in using their rulemaking

> authority to deal with technical matters such as the scope of the definitions and their applicability to foreign issuers.

The foregoing show Congress's keen awareness of the application of some of the Sarbanes-Oxley Act provisions to entities in other countries and of the associated problems. Accordingly, Congress's complete silence as to overseas application of the instant whistleblower protection provision (combined with Congress's repeated reference to the need for that provision to supplement state enforcement), provides significant indication that Congress did not intend 18 U.S.C. § 1514A to apply extraterritorially.

3. Other Factors

Other factors lend support to the conclusion that the whistleblower protection provision in 18 U.S.C. § 1514A was not meant to apply extraterritorially.

a. Problems of Extraterritorial Enforcement

If the whistleblower protection provision is given extraterritorial reach in a case like the present one, it would empower U.S. courts and a U.S. agency, the DOL, to delve into the employment relationship between foreign employers and their foreign employees. Carnero, whose direct employers were two Latin American corporations, has asked the United States district court for, among other relief, his reinstatement. The door would thus be opened for U.S. courts to examine and adjudicate relationships abroad that would normally be handled by a foreign country's own courts and government agencies pursuant to its own laws. In

enacting other laws that affect employment relationships extraterritorially, members of Congress have recognized "the well-established principle of sovereignty . . . that no nation has the right to impose its labor standards on another country." See S. Rep. 98-467, at 27-28 (1984), reprinted in 1984 U.S.C.C.A.N. 2974, 3000-01 (limiting age discrimination law's extraterritorial reach to U.S. citizens employed by U.S. corporations or their subsidiaries in countries that do not have inconsistent laws); *see also Foley Bros., 69 S. Ct. at 578* (noting that "labor conditions [of its own citizens] are the primary concern of a foreign country"). We believe if Congress had intended that the whistleblower provision would apply abroad to foreign entities, it would have said so, and certainly would have considered, before enacting the law, the problems and limits of extraterritorial enforcement. Yet Congress did not at any time discuss the interest other countries would have in regulating these employment relationships, nor did Congress include in the whistleblower provision any mechanism for resolving potential conflicts with foreign labor laws and procedures. Congress's complete silence suggests that it had no thought or intention to apply this provision to foreign employees and entities as now proposed.

Further suggestive of Congress's lack of extraterritorial intent is its failure to provide any mechanism for enforcing the whistleblower protections in a foreign setting. Congress did not grant, or even discuss the granting of, extraterritorial investigatory powers to the Department of Labor, the agency charged with administering whistleblower complaints.[13] See *Aramco, 499 U.S. at 256* (concluding that Congress's restrictive intent as to geographic reach of Title VII was evidenced

by lack of extraterritorial venue and other enforcement mechanisms in statute). No reference is made to providing for interpreters, for coordinating with the Department of State, or for the utilization of foreign personnel. Significantly, the DOL is given only sixty days to complete its entire investigation of a complaint and to issue findings under the procedure mandated by 49 U.S.C. § 42121(b)(2)(A).[14] See 18 U.S.C. § 1514A(b)(2). This short time frame seems unrealistic if the DOL were expected to conduct investigations overseas.[15] Moreover, if an administrative hearing is held, the hearing "shall be conducted expeditiously" under 49 U.S.C. § 42121(b)(2)(A). See id. There is no provision either for the resources or the flexibility that might be needed in dealing with foreign matters; and, as said, the legislative history contains no discussion of this or other problems likely to arise had Congress meant this provision to apply outside the territorial United States. The statute, it must be remembered, protects a whistleblowing employee from retaliation or other discrimination by a publicly traded company, or "any officer, employee, contractor, subcontractor, or agent of such company." Id. § 1514A(a). If the statute has extraterritorial effect, this broad coverage would create an expansive class of potential whistleblowers by extending its protections to countless employees in countless areas around the world. And yet, there is no discussion about the increased administrative and logistical burdens that would fall on the DOL to administer such a far-reaching statute. These omissions are striking. They indicate that Congress did not focus on the possibility of extraterritorial application, with its attendant problems.

b. The Venue Provisions Contemplate Domestic Claims Only

The whistleblower provision in question includes venue provisions instructing as to the particular federal court within which judicial claims are to be brought. There is no venue provision specifically tailored to claims based on conduct abroad, and, significantly, two of the venue provisions for various stages of court review would exclude foreign claims of the instant sort.

For whistleblower complaints brought under 18 U.S.C. § 1514A, the Act incorporates by reference the procedural structure for whistleblower complaints filed with the United States Department of Labor under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121 (2005). Id. § 1514A(b)(2)(A) ("An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49 United States Code.").[16] AIR21 contains nothing prescribing a federal venue for whistleblower complaints or appeals based on conduct abroad, brought by employees resident and working in a foreign country. While de novo review, such as in this case, may be sought "in the appropriate district court of the United States," the "appropriate court" is not defined, 18 U.S.C. § 1514A(b)(1)(B). 49 U.S.C. § 42121(b)(6) and related provisions suggest that the appropriate court is one in the jurisdiction of which the whistleblower violation occurred or the complainant resided. Hence 49 U.S.C. § 42121(b)(4)(A) provides that appeal from the Secretary's final order should be directed to the federal court of appeals "for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation." Section 42121(b)(5) pro-

vides that the Secretary may enforce a final order by filing a civil action "in the United States district court for the district in which the violation was found to occur." Even if the "appropriate court" language is broadly construed to allow venue at a stage like the present, the above restrictive venue provisions would deny venue at other key stages of proceedings instituted by a foreign employee. For Congress to have deliberately created such a discrepancy would seem highly improbable. It is more likely Congress simply did not contemplate the filing of administrative complaints by foreign employees working abroad, and hence enacted no comprehensive set of venue provisions suited to that eventuality.

c. The Department of Labor's Preliminary Rulings

The DOL has not issued any policy statement on the geographic reach of the whistleblower protection statute. Indeed, the DOL has declined to make a statement of policy. When asked by commentators prior to the promulgation of its final regulations to exclude from the statute's coverage employees working outside of the United States, the DOL replied: "The purpose of this rule is to provide procedures for the handling of Sarbanes-Oxley discrimination complaints; this rule is not intended to provide statutory interpretations." See Sarbanes-Oxley Regulations, 69 Fed. Reg. 52104-01, 52105, 2004 WL 1876043 (Aug. 24, 2004).

OSHA's Regional Administrator and the DOL's Administrative Law Judges, however, have held on at least three occasions (in this case and two others) while adjudicating whistleblower complaints under 18 U.S.C. § 1514A that the statute does not apply extraterritorially

to employees working outside of the United States, based on their examination of the statute and their interpretation of the case law. See Carnero v. Boston Scientific Corp., 2004-SOX-22 (OSHA Reg'l Adm'r) (Dec. 19, 2003); Concone v. Capital One Fin. Corp., 2005-SOX-6 (ALJ) (Dec. 3, 2004); Ede v. Swatch Group, 2004-SOX-68, 2004-SOX-69 (ALJ) (Jan. 14, 2005)Sarbanes-Oxley Act. These determinations suggest at least the misgivings of the designated enforcement agency about interpreting 18 U.S.C. § 1514A as embracing extraterritorial enforcement.

4. No Clear Expression of Congressional Intent

Whether to confer extraterritorial effect is a policy choice for Congress. Our role is limited to ascertaining Congress's intent. "In essence, [the foreign claimant such as Carnero] asks this court to conclude that Congress balanced [the provision's] important goals against the foreign sovereignty concerns that underlie the presumption against extraterritoriality, considered the implications of application abroad and then addressed these concerns by inviting courts to read between the lines." *Boureslan v. Aramco, Arabian Am. Oil Co., 892 F.2d 1271, 1274 (5th Cir. 1990) (en banc), aff'd sub nom. E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991).* For the reasons stated above, we see no indication that Congress entered into any such balancing. To the contrary, it made no reference to application abroad and tailored the relevant statute to purely domestic application. We hold that 18 U.S.C. § 1514A does not reflect the necessary clear expression of congressional intent to extend its reach beyond our nation's borders.[17] We hold, there-

fore, that the district court properly dismissed Carnero's complaint under 18 U.S.C. § 1514A.

III. The State Law Claims

We turn next to the dismissal of Carnero's claims under Massachusetts law for, among other things, breach of contract and retaliatory termination. The district court based the dismissal on two factual findings: (1) Carnero "had no contact with the defendant in Massachusetts," and (2) "defendant [did not] in any way direct or control plaintiff [in his employment]." Carnero, No. 03-11479-RWZ (D. Mass.) (Mar. 25, 2004 endorsed order).

Carnero argues that these findings are not supported by the record. We need not decide the correctness of these findings, however, because we agree with BSC that we may affirm the district court's judgment based on an alternative ground presented below in BSC's motion to dismiss the complaint: that BSA is an indispensable party under Fed. R. Civ. P. 19 and could not be joined without destroying the court's diversity jurisdiction. See *Gabriel v. Preble, 396 F.3d 10, 12 (1st Cir. 2005)* (noting that appellate court may affirm order of dismissal on any ground fairly presented by the record); *see also Am. Fiber & Finishing, Inc. v. Tyco Healthcare Group, LP, 362 F.3d 136, 138-39 (1st Cir. 2004)* (noting that challenge to federal subject matter jurisdiction may be considered for the first time on appeal).

Even assuming that BSC played a significant role in Carnero's employment, it is clear from Carnero's complaint that Carnero worked for BSA, was paid by BSA, complained about alleged billing irregularities at BSA, was terminated from BSA, and seeks to be reinstated

at BSA. BSA is obviously needed for a full and just adjudication of this dispute, and could not be joined without destroying the court's diversity jurisdiction because BSA and Carnero are both Argentinian citizens. *See, e.g., H.D. Corp. of P.R. v. Ford Motor Co., 791 F.2d 987, 993 (1st Cir. 1986)* (reciting Fed. R. Civ. P. 19(b) factors and affirming dismissal of action where non-diverse parent company was indispensable party in part because it was signatory to agreements at issue).[18]

For the foregoing reasons, the judgments of the district court are affirmed.

So Ordered.

Footnotes

n1 The Secretary of Labor has delegated her responsibility for receiving and investigating whistleblower complaints to the Occupational Safety and Health Administration ("OSHA"), an agency within the DOL. Secretary's Order 5-2002; Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 67 Fed. Reg. 65008-01, 65008, 2002 WL 31358967 (Oct. 22, 2002); see 29 C.F.R. § 1980.103(c) (2005). For convenience, we will frequently refer to the Secretary and OSHA as the DOL.

n2 Carnero also filed objections to the DOL's preliminary findings. The DOL issued a final decision dismissing the complaint because of the pending court action.

n3 18 U.S.C. § 1514A(a) provides:

Whistleblower protection for employees of publicly traded companies.--No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . .; or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation [of the above].

n4 18 U.S.C. § 1514A(b), the enforcement provision, allows a "person" who alleges discharge or discrimination in violation of subsection (a) to seek relief. Id. § 1514A(b)(1).

n5 15 U.S.C. § 78l(g)(3) (1997) allows the SEC to exempt from that subsection "any security of a foreign issuer . . . if the Commission finds that such exemption is in the public interest and is consistent with the protection of investors." Also, 15 U.S.C. § 78o(d) (1997) pro-

vides that "nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof."

n6 "Issuer" is defined in Section 2(a)(7) of the Act as "an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn." The definition of "issuer" is thus slightly broader than the definition of companies subject to the whistleblower protection provision, since it includes any company that has not yet become listed on a U.S. securities exchange.

n7 15 U.S.C. § 78j-1(m)(4) provides:

Complaints.--Each audit committee shall establish procedures for--(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

n8Section 307 of the Sarbanes-Oxley Act directs the SEC to "issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers," including a rule requiring the internal reporting "of a material violation of securi-

ties law or breach of fiduciary duty or similar violation by the company or any agent thereof." See 15 U.S.C. § 7245 (2005). The SEC has applied this internal reporting provision to domestic and foreign attorneys. See 17 C.F.R. § 205.2(a)(2)(ii), (c), and (j) (2005) (defining "attorney" to include "any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign," but excepting a "non-appearing foreign attorney"); see generally Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296-01, 2003 WL 247093 (Feb. 6, 2003) (SEC Final Rule implementing Section 307).

As with Section 301, we find this provision of limited value in discerning the geographic reach of the employee protections in Section 806. It does not implicate the foreign sovereignty and other concerns that are raised by a provision providing for an adjudicatory process and remedies.

n9 It appears that through a drafting error, Congress enacted two subsections (e). The other subsection covers conspiracy.

n10 18 U.S.C. § 1513(e) provides:

> Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

n11 Some amendments to the original bill (offered by Senator Grassley and cosponsored by Senator Leahy) made its protections more consistent with those provided to other non-government employees, like those in the aviation industry. The original bill was revised to exclude punitive damages and to remove a provision that allowed immediate access to federal district courts. However, a compromise provided corporate whistleblowers with access to federal court in the event the Secretary of Labor fails to issue a final decision within six months. Id. at 22, 26.

n12 The legislative history also indicates that the whistleblower protections for corporate employees were meant to closely track the protections offered to airline employees under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121 (2005). See S. Rep. 107-146, at 26. We have found no indication that AIR21's whistleblower protections apply extraterritorially.

n13 The DOL has been charged with administering whistleblower complaints in a variety of employment contexts, even where another agency, having the technical expertise in the subject area of the complaints (such as the SEC here), has overall control. See, e.g., *Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1509 (10th Cir. 1985)* (noting that DOL administers nuclear energy employee whistleblower complaints, even though the Nuclear Regulatory Commission has expertise on nuclear issues).

n14 49 U.S.C. § 42121(b)(2)(A) provides, in relevant part:

Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings.

n15 While other whistleblower protection statutes provide for a sixty-day investigation time frame, see Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg. 52104-01, 52108, 2004 WL 1876043 (Aug. 24, 2004) ("Sarbanes-Oxley Regulations") (citing AIR21 and the Surface Transportation Assistance Act), to our knowledge, none of these statutes have been applied extraterritorially to employees resident and working outside of the United States.

n16 The "Whistleblower Protection Program" under AIR21 provides for: (1) the filing of a complaint with the Secretary of Labor alleging retaliatory discharge or discrimination; (2) an opportunity for the person named in the complaint to submit a written response and meet with a representative of the Secretary to present witness statements; (3) an investigation by the Secretary into the merits of the complaint; (4) a preliminary order by the Secretary providing relief, including reinstate-

ment, if there is reasonable cause to believe a violation occurred, (5) the opportunity to file objections and request a hearing; (6) a final order by the Secretary providing relief or denying the complaint; (7) appellate court review of the Secretary's final order; and (8) enforcement of the final order in the federal district court by the Secretary or parties. See 49 U.S.C. § 42121(b).

The DOL regulations implementing AIR21 and Sarbanes-Oxley whistleblower protection provisions provide for the receipt and investigation of complaints by OSHA, hearings by the Office of Administrative Law Judges, and appeals of ALJ decisions by the Administrative Review Board (all acting on behalf of the Secretary of Labor). See 29 C.F.R. pt. 1980 (2005) (Sarbanes-Oxley Regulations); 29 C.F.R. pt. 1979 (2005) (AIR21 Regulations).

n17 We decide this case necessarily on its own facts. One can imagine many other fact patterns that may or may not be covered by our reasoning in today's decision. We do not, for example, decide today whether Congress intended to cover an employee based in the United States who is retaliated against for whistleblowing while on a temporary assignment overseas. That issue is not before us as Carnero was a resident of Argentina and Brazil directly employed by foreign companies operating in those countries.

n18 Carnero does not present any argument on appeal as to why BSA should not be treated as an indispensable party. He merely argues that we should reverse and remand the state law action to the district court for further factual findings. No additional findings are required, though, given the nature of Carnero's relation-

ship with BSA as alleged in his complaint. And, although Carnero includes a brief reference in his reply brief to an argument he raised below regarding BSA's necessity as a party, we find that argument waived, see *Hoult v. Hoult, 373 F.3d 47, 53 (1st Cir. 2004)* (noting that appellant cannot raise argument for first time in reply brief); *United States v. Bongiorno, 106 F.3d 1027, 1034 (1st Cir. 1997)* (noting that court will not consider argument raised in perfunctory manner), and without merit in any event.

CIVIL ACTION NO. 04-10031-RWZ

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RUBEN CARNERO

v.

BOSTON SCIENTIFIC CORP.

August 27, 2004, Decided

COUNSEL: For Ruben Carnero, Plaintiff: Michael Lushan, LEAD ATTORNEY, Lushan, McCarthy & Goonan, Brookline, MA.

For Boston Scientific Corporation, Defendant: James W. Nagle, Leslie S. Blickenstaff, LEAD ATTORNEYS, Goodwin Procter, LLP, Boston, MA.

JUDGES: RYA W. ZOBEL, UNITED STATES DISTRICT JUDGE.

OPINIONBY: RYA W. ZOBEL

OPINION:

MEMORANDUM OF DECISION

ZOBEL, D.J.,

Plaintiff Ruben Carnero is an Argentinean citizen who worked for the Argentinean and Brazilian subsidiaries of defendant Boston Scientific Corporation, until he was terminated in 2002 allegedly after he reported

accounting irregularities. Consequently, plaintiff initiated three actions: (1) a conciliation proceeding in Argentina seeking statutory severance; (2) an eight count Complaint against defendant, which this Court dismissed for lack of jurisdiction; and (3) an administrative complaint against defendant with the Department of Labor. The administrative complaint alleges retaliatory termination and other discrimination by defendant's Argentinean and Brazilian subsidiaries in violation of *18 U.S.C. § 1514A*, which was enacted as part of the Corporate and Criminal Fraud Accountability Act of 2002, and incorporated as Title VIII of the *Sarbanes-Oxley Act of 2002*. On December 19, 2003, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration ("OSHA"), preliminarily determined that OSHA has no jurisdiction to consider the merits of plaintiff's claim because nothing in the language of *Section 1514A* indicates any intention by Congress to cover employees working outside of the United States. (Pl.'s Decl. in Opp'n to Mot. to Dismiss, Tab 30). On January 7, 2004, plaintiff filed a Complaint in this Court seeking a de novo review of his administrative complaint and relief in the form of: reinstatement to his job, back pay, damages for loss of reputation, lost future wages, emotional distress and other economic injury.[1] Thereafter, on January 22, 2004, the Secretary issued a final decision dismissing the administrative complaint because of the pendency of the complaint in this Court. (Pl.'s Decl. in Opp'n to Mot. to Dismiss, Tab 31). Defendant Boston Scientific Corporation now moves to dismiss, or in the alternative, for summary judgment or stay.

Defendant asserts that *Section 1514A* does not apply to plaintiff, a foreign national who worked exclusively overseas. It is well established that Congressional legislation is meant to apply within the United States, absent any evidence of contrary intent. *Smith v. United States, 507 U.S. 197, 204, 122 L. Ed. 2d 548, 113 S. Ct. 1178 (1993).* This principle is based on a number of reasons, including "the commonsense notion that Congress generally legislates with domestic concerns in mind." Id. at n. 5. Thus, the language of the law is examined to determine whether there is "any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or some measure of legislative control." *Foley Bros. v. Filardo, 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575 (1949).* The scheme of the law is also considered as well as whether any distinction is drawn between alien employees and those who are citizens of the United States. *Id. at 286.* See, e.g., *29 U.S.C. § 623(f)(1)*(stating that it is not unlawful for an employer to take action which is prohibited under the *Age Discrimination in Employment Act of 1967*, where the employee is in a foreign country and compliance with the statute would violate foreign law.). The absence of such distinction suggests that the law is to be applied only within the United States. *Foley Bros., 336 U.S. at 286.* Finally, the legislative history and the administrative interpretations of the law as it was developed may be taken into account. *Id. at 287-288.*

Title *18 U.S.C. § 1514A(a)* provides that no company subject to the *Securities Exchange Act of 1934* may retaliate against an "employee" who lawfully cooperates with an investigation concerning violations of the Act or fraud on the shareholders. *Section 1514A(b)*, the

enforcement provision, allows any "person" who alleges discharge or discrimination in violation of *Section 1514A(a)* to seek relief.

Nothing in *Section 1514A(a)* remotely suggests that Congress intended it to apply outside of the United States. No distinction is drawn between overseas employees and domestic employees. In fact, application of *Section 1514A* overseas may conflict with foreign laws, which is especially likely in this case where plaintiff seeks to be reinstated to his job. Notably, he has already invoked Argentinean law in support of his cause. He misunderstands the canon of construction when he asserts that neither the language nor the legislative history restricts the application of *Section 1514A* to domestic employees.

The protection of workers is a particularly local matter, and nothing in the legislative history supports plaintiff's assertion that the language of *Section 1514A* protecting an "employee" was meant to include all employees wherever they may work.

Finally, the parties do not point to any administrative interpretations of the law during its development phase. In any case, the preliminary determination by the Department of Labor coincides with this Court's reasoning.

Accordingly, defendant's motion to dismiss is allowed.

Judgment may be entered for the defendant.

8/27/04

DATE

/s/

RYA W. ZOBEL

UNITED STATES DISTRICT JUDGE

Footnotes

n1 Because the Secretary of Labor did not issue a final decision within 180 days of the filing of the administrative complaint, plaintiff filed suit in this Court pursuant to *18 U.S.C. § 1514A(b)(1)(B).*

Nos. 04-1801, 04-2291

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RUBEN CARNERO,
Plaintiff, Appellant,

v.

BOSTON SCIENTIFIC CORPORATION,
Defendant, Appellee.

Entered: 5/2/06

JUDGES: Before Boudin, Chief Judge, Campbell and Cyr, Senior Circuit Judges. Torruella and Selya, Lynch, Lipez and Howard, Circuit Judges.

ORDER OF THE COURT

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

TITLE 18 > PART I > CHAPTER 73

§ 1514A. Civil action to protect against retaliation in fraud cases

(a) Whistleblower Protection for Employees of Publicly Traded Companies.— No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o (d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or

otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) Enforcement Action.—

(1) In general.— A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) Procedure.—

(A) In general.— An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121 (b) of title 49, United States Code.

(B) Exception.— Notification made under section 42121 (b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) Burdens of proof.— An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121 (b) of title 49, United States Code.

(D) Statute of limitations.— An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

(c) Remedies.—

(1) In general.— An employee prevailing in any action

under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) Compensatory damages.— Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(d) Rights Retained by Employee.— Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

Supreme Court, U.S.
FILED
MAY 26 2006
OFFICE OF THE CLERK

(2)

No. 05-1397

IN THE

Supreme Court of the United States

RUBEN CARNERO,

Petitioner,

v.

BOSTON SCIENTIFIC CORPORATION,

Respondent.

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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May 26, 2006

QUESTION PRESENTED

Whether the court of appeals correctly held that the whistleblower provision of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A(a), does not protect a foreign employee complaining of misconduct by his overseas employer which is a subsidiary of a U.S. company but is not itself a "company" within the meaning of the statute.

RULE 29(6) CORPORATE DISCLOSURE STATEMENT

Boston Scientific Corporation has no parent corporation and no publicly-held company holds 10% or more of its stock.

TABLE OF CONTENTS

Statement Of The Case.....1

Reasons For Denying The Writ 2

Conclusion.....5

TABLE OF AUTHORITIES

CASES: **PAGE**

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991).....1

STATUTES:

Sarbanes-Oxley Act:

§ 2(a)(7), 15 U.S.C. § 7201(7).....3
§ 106, 15 U.S.C. § 7216.....3
§ 306, 15 U.S.C. § 7244.....2
§ 406, 15 U.S.C. § 7264.....2
§ 407, 15 U.S.C. § 7265.....2
§ 1107, 18 U.S.C. § 1513(e).....4
§ 806, 18 U.S.C. § 1514A(a).....1, 3, 4

STATEMENT OF THE CASE

Petitioner was employed by an Argentinean subsidiary of respondent Boston Scientific Corporation ("BSC") under an employment agreement governed by Argentinean law. Pet. App. 2a, 8a. When he was terminated from that employment he filed a claim against BSC with the Department of Labor ("DOL") under the whistleblower provision of the Sarbanes-Oxley Act ("SOX"). 18 U.S.C. § 1514A(a), added by SOX § 806. Pet. App. 4a. Petitioner alleged that he was fired in retaliation for alerting his superiors to financial irregularities in the operations of BSC's Latin America subsidiaries. *Id.* at 1a.

The DOL issued a preliminary ruling that it had no jurisdiction over petitioner's claim because § 1514A(a) does not apply to foreign nationals working overseas. *Id.* at 4a. Petitioner then sought de novo review of his claim in the District Court for the District of Massachusetts. The District Court dismissed the claim, agreeing with the DOL that § 1514A(a) does not apply extraterritorily. *Id.* at 5a, 40a-44a.

The First Circuit affirmed. It adhered to this Court's teaching in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) ("*Aramco*") that a court must assume that Congress legislates with an awareness of a presumption against extraterritorial application, and that the presumption may be overcome only by an "'affirmative intention of the Congress clearly expressed.'" Pet. App. 11a, quoting *Aramco*, 499 U.S. at 248. The court then carefully examined the statute's "text, context, structure, and legislative history," Pet. App. 11a, concluding that Congress "made no reference to application abroad and tailored the relevant statute to purely domestic application." *Id.* at 30a. Accordingly, the court held that § 1514A(a) "does not reflect the necessary clear expression of congressional intent to extend its reach beyond our nation's borders." *Id.*

REASONS FOR DENYING THE WRIT

1. Whether the SOX whistleblower provision applies to a foreign employee of a U.S. corporation's overseas subsidiary that is not a "company" under the statute presented a case of first impression in both the district court and the court of appeals. Pet. App. 6a. No other federal court to our knowledge has yet addressed the issue. Hence no intercircuit conflict requiring the Court's resolution exists.

2. The decision below does not conflict with any SOX regulations issued by the Securities and Exchange Commission.

Congress charged the SEC with administering the SOX provisions that may fairly be characterized as securities laws and that therefore fall within the purview of the SEC's regulatory expertise. Congress obviously considered SOX's whistleblower provision, however, to be an employment law, for it delegated its administration to the DOL. Thus there is no conflict between the SEC's determination that the provisions it enforces apply extraterritorily and the ruling below – with which the DOL agrees[1] – that the whistleblower provision does not.

Plaintiff is incorrect in contending that the SEC and the First Circuit have construed identical statutory language differently. The SEC has by rule determined that three provisions of the statute that refer to securities "issuers" apply to foreign as well as domestic issuers. *See* Pet. 6.[2]

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[1] Pet. App. 29a-30a.

[2] SOX § 306, 15 U.S.C. § 7244, prohibits certain insider trading by officers and directors of an issuer; § 406, 15 U.S.C. § 7264, requires issuers to disclose whether they have adopted a code of ethics for senior financial officers; and § 407, 15 U.S.C. § 7265, requires issuers to disclose whether a financial expert sits on their audit committee.

Section § 1514A(a), the whistleblower provision, speaks of a "company" rather than an "issuer." Petitioner notes that the description of a "company" in § 1514A(a) is similar to the statutory definition of "issuer." Pet. App. 5-6 n.1.[3] But the First Circuit has not ruled that the term "company" in § 1514A(a) means something different from the term "issuer" in the provisions addressed by the SEC. Indeed, the question whether the term "company" might include a foreign company does not arise in this case, where the only entity that fits the description of "company" is the respondent, a domestic company. Nor has the First Circuit in any respect impugned the validity of the SEC "issuer" regulations, which the court never mentioned.

3. Review here is also not warranted because the decision below is correct. The First Circuit carefully considered petitioner's arguments but found them outweighed by the textural silence on the extraterritoriality issue, the statute's legislative history, and a host of positive indicia "that Congress thought the statute was limited to the territorial jurisdiction of the United States." Pet. App. 11a. Thus, the court noted–

- that SOX § 106, 15 U.S.C. § 7216, specifically addresses the extraterritorial application of the statute to foreign accounting firms (Pet. App. 15a);

---

[3] "Issuer" means "an issuer (as defined in section 3 of the Securities Exchange Act of 1934 * * *) the securities of which are registered under * * * that Act * * * or that is required to file reports under [that Act], or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 * * *." SOX § 2(a)(7), 15 U.S.C. § 7201(7). Section 1514A(a) provides that "[n]o company with * * * securities registered under * * * the Securities Exchange Act * * * or that is required to file reports under" that Act, shall retaliate against a whistleblower employee. 15 U.S.C. § 1514A(a).

- that Congress elsewhere in SOX provided expressly for extraterritorial enforcement of a different, criminal, whistleblower provision, 18 U.S.C. § 1513(e), added by SOX § 1107 (Pet. App. 16a); and

- that the legislative history of other statutory provisions "show[s] Congress's keen awareness of the application of some of the [statute's] provisions to entities in other countries and of the associated problems" (Pet. App. 25a).

The court also noted that Congress provided no mechanisms "for resolving potential conflicts with foreign labor laws and procedures" or "for enforcing the whistleblower protections in a foreign setting." Pet. App. 26a. "[T]here is no discussion about the increased administrative and logistical burdens that would fall on the DOL to administer" a statute protecting "countless employees in countless areas around the world." *Id.* at 27a.

Finally, the First Circuit observed that § 1514A's venue provisions contemplate domestic claims only (*id.* at 28a), and that in three decisions the DOL has ruled that § 1514A(a) has no extraterritorial reach. *Id.*

For all these reasons, the court below correctly held that § 1514A(a) "does not reflect the necessary clear expression of congressional intent to extend its reach beyond our nation's borders." *Id.* 30a. Hence further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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